UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD THIRD REGION

HP HOOD LLC1

Employer

and Case 3-RC-11971

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 118

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, I find:

- 1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
- 2. The parties stipulated that HP Hood LLC, hereinafter referred to as the Employer, operates two facilities located in Sodus, New York and one in Wolcott, New York, (collectively known as the "Heluva Good" operations),² where it is engaged in the production and distribution of dairy products. Annually, the Employer, in conducting its business operations, purchases and receives goods, supplies and materials valued in excess of \$50,000 directly from points outside the

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¹ The Employer's name appears as amended at the hearing.

² The Employer sells product processed and/or stored at these three facilities under the Heluva Good brand name.

State of New York. Based on the parties' stipulation and the record as a whole, I find that the Employer is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that it will effectuate the purposes of the Act to assert jurisdiction herein.

- 3. The parties stipulated, and I find, that the International Brotherhood of Teamsters, Local 118, hereinafter referred to as the Petitioner, is a labor organization within the meaning of Section 2(5) of the Act.
- 4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) of the Act.

Petitioner seeks a unit of all full-time and regular part-time warehouse employees at the Employer's Heluva Good operations, excluding all other employees. It would not proceed to an election in an alternative unit. The Employer asserts that the only appropriate unit is one which includes all warehouse employees, the "plant clerical" employee, ³ the facilities maintenance/warehouse employee, and the transportation and production employees employed at the three Heluva Good facilities. The Petitioner seeks to exclude these individuals from the bargaining unit, asserting that they do not share a community of interest with the employees in the petitioned-for unit. The Employer contends that they should be included in any unit found appropriate herein inasmuch as they share a sufficient community of interest with the warehouse employees, as well as the transportation and production employees at the three Heluva Good facilities. There is no history of collective bargaining at the Employer's Heluva Good facilities.

Based on the evidence adduced during the hearing and the relevant case law, I conclude that the appropriate unit includes all full-time and regular part time warehouse employees, the facilities

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³ The clerical employee at issue is Donna Lehr. The record does not reflect any specific job title for Lehr, however, the Employer, in the record refers to her as the "plant clerical" employee.

maintenance/warehouse employee and the plant clerical employee, and I shall direct an election in the unit found appropriate herein.

FACTS

Pratt Road facility

The Employer has a 44,000 square foot facility located on Pratt Road in Sodus, New York, where it receives, prepares, loads and transports cheese to its customers using company vehicles and common carriers. The Pratt Road facility also receives finished product for storage and/or distribution from other Employer facilities, including its Wolcott, New York facility. There are approximately 35 production employees and 12 transportation employees employed at the Pratt Road facility, in addition to 9 of the 10 warehouse employees⁴ in the petitioned-for unit.⁵ The facilities maintenance/warehouse and plant clerical employee whose inclusion in the unit is in dispute are located at the Pratt Road facility.

The administrative offices for the Heluva Good operations are located at this facility. A door across the hall from the administrative area leads into the production room, which is located in an enclosed space between the administration and warehouse areas. A second door on the opposite side of the production room leads to the warehouse area. The warehouse area consists of a finished goods cooler, aging cooler, storage area, shipping and receiving area, and a maintenance shop. Rest rooms, locker rooms, the break room, and the reception area are located near the front of the building. A long hallway runs from the facility's front doors to the administrative offices and the production room. A corridor between the reception area and the warehouse passes the enclosed production area on one side and the break room, and mechanic room on the other side. The

⁴ One of these nine warehouse employees works two days at the Pratt Road facility and three days at the Barclay Road

⁵ The parties agree that the two warehouse leadmen, one employed at the Pratt Road facility and the other at the Barclay Road facility, are not supervisors and should be included in any unit found appropriate herein.

employee parking lot is located just outside the front doors. A separate exterior entrance leads into the storage area of the warehouse.

Barclay Road facility

The Employer's Heluva Good Barclay Road facility is located five miles from the Pratt Road facility, on Barclay Road in Sodus, New York. The Barclay Road facility is approximately 11,500 square feet and is used for multiple purposes, including storage and limited special product packaging runs for other HP Hood facilities described more fully below. There are four direct store delivery (DSD) drivers and one full-time lead warehouse employee employed at the Barclay Road facility. There are no production employees permanently employed at this facility.

Wolcott facility

The Wolcott facility is located 10 miles from the Barclay Road facility and 15 miles from the Pratt Road facility. This 6,500 square foot facility solely manufactures and bottles horseradish. Four production employees are employed at the Wolcott facility. There are no transportation drivers or warehouse employees employed at this location.

Functional Integration

Pratt Road Facility

Transportation drivers bring blocks of cheese to the Pratt Road facility.⁷ They give their paperwork to clerical employee Donna Lehr, who enters receipt of the product into the warehouse management computer system. Warehouse employees place the cheese in the aging cooler. When the aging process is complete, a warehouse employee removes the cheese from the cooler racks and places it in a staging area in the aging cooler. The production supervisor notifies the warehouse of the type and amount of cheese that is going to be processed each day. A production employee

⁶ As noted above, there is also a warehouse employee who works at the Barclay facility three days per week and at the Pratt facility two days per week.

⁷ The record does not disclose where the blocks of cheese come from.

retrieves the cheese from the staging area and takes it to the production room for cutting and wrapping. Once the cutting and wrapping is finished, a production employee moves the cheese to a staging area in the finished goods cooler. A warehouse employee puts the finished goods away.

Customer service receives and processes orders.⁸ Warehouse employees pick the orders off the racks in the finished goods cooler and put the load together. The truckloads are loaded by a warehouse employee onto trailers, which are then sealed and moved into the parking lot by a warehouse employee. The transportation drivers deliver the load to the customers.

Barclay Road Facility

Warehouse employees at the Barclay Road facility are responsible for loading the DSD trucks with finished product to be sold to customers and loading materials that are held in storage for the Wolcott facility. The DSD drivers go directly to the grocery stores to sell product off their trucks. There are limited occasions when special product runs, such as combination packages of different cheeses or dips, are coordinated through the Barclay Road facility. Packaging is performed at Barclay Road by production employees either from Pratt Road or Wolcott. The warehouse employee at Barclay Road receives the product and packaging for the special runs and loads the trailers to ship the product to the Employer's facilities or to customers.

Wolcott Facility

Four production employees work at the Wolcott facility. They grind and bottle horseradish. The Employer sends trucks from the Pratt Road facility to Barclay to pick up raw materials and deliver them to the Wolcott facility or to pick up finished product to transport to the Pratt Road facility, where it is stored until sold.

⁸ The record does not elaborate further as to the identity or function of the customer service employee(s).

⁹ Some of these "special run" products may come from Employer facilities, unidentified in the record, other than the Heluva Good facilities.

Central Control over Labor Relations

As stated above, the Employer's administrative offices for the Heluva Good operations are located at the Pratt Road facility. Human resources manager Kathy Baker and plant manager Scott Wagner work at this facility. Baker, in conjunction with the departmental supervisors discussed below, does the hiring for all three facilities. Basic discipline is administered by the departmental supervisor. Baker reviews all discipline and corrective actions taken within the Heluva Good operations. Wagner reviews all disciplinary action that may result in a suspension or termination. All employees are subject to the same disciplinary policy.

Supervision

Adam DePuy is the warehouse, facilities and transportation supervisor. He supervises the warehouse employees, the facilities maintenance employee, clerical employee Donna Lehr, and the transportation employees at the Pratt Road facility, and the warehouse employee at the Barclay Road facility. Susan Heffernan supervises the production employees at the Pratt Road facility and Mike McDonald supervises the production employees at the Wolcott facility. The record revealed that an unnamed route manager at the Barclay Road facility supervises the DSD drivers.

On April 7, 2010, the Employer hired Tim Perry as the "P.M. Facility Supervisor," to supervise the 15 production and 2 warehouse employees who work on the second shift at the Pratt Road facility. As of the date of the hearing, Perry was still in training for the second shift supervisor position. During his training period, Perry works from 12:00 noon until 12:00 midnight, dividing his work hours between the first and second shift. Perry recently started working from 4:00 p.m. until 3:30 a.m. on Thursdays in order to address clean-up problems occurring on the

¹⁰ DePuy and Heffernan work the day shift. Before Perry's hire, there was no supervision on the second shift. The lead person on the second shift in the warehouse would contact DePuy at home if an issue arose in the warehouse. The lead person on the second shift in production would contact Heffernan at home if an issue arose in production.

¹¹ The record does not reveal how long the training period is expected to last.

second shift. As of the date of the hearing, Perry had issued one disciplinary notice to an employee on the second shift. The record does not indicate whether the employee who received the discipline was a production or warehouse employee. The Employer's plant manager testified that while production and warehouse employees on the second shift contact DePuy and Perry when calling off of work due to illness, he expects that the employees on the second shift should call Perry alone on such occasions.¹²

Employees' Skills and Functions

The record reveals that warehouse and production employees have the same basic skill level. Warehouse employees load and unload trucks, pick orders, move product around the warehouse, and use the warehouse management computer program. Production employees operate cutters, inspect, wrap and package product, move product into and out of the production room, and use the warehouse management computer program. The Employer prefers to hire employees with a high school diploma or GED, but it is not required. The DSD drivers at the Barclay Road facility are required to have a Class B commercial driver's license and the transportation drivers at the Pratt Road facility are required to have a Class A commercial driver's license. There are two employees, one warehouse and one facilities maintenance/warehouse, who have Class B licenses and who, on occasion, transport product between the Employer's facilities. The Employer does not require the warehouse employees to have Class B licenses.

All warehouse employees are required to obtain training and achieve certification to operate a forklift. Approximately 15 percent of the production employees are trained to operate a forklift, but are not required to have forklift certification. Warehouse and production employees are trained

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¹² The record does not disclose whether the second-shift employees have been told to contact Perry alone when calling off work due to illness.

and receive certifications to operate other types of motorized equipment used to move product, such as hand jacks and walkies.

Warehouse employees have been assigned to move furniture and remove snow during the winter, mow the lawns at the Pratt and Barclay Road facilities, and perform small construction projects, such as installing a sidewalk and fence at the Pratt Road facility. The record does not indicate that production employees have been assigned to perform these duties.

General Working Conditions and Benefits

Warehouse and production employees have different work schedules at the Pratt Road facility. First-shift warehouse employees work eight-hour days, Monday through Friday, starting between 6:00 and 7:00 a.m. and ending at 3:00 or 4:00 p.m. ¹³ The first-shift production employees work 4 10-hour days, Monday through Thursday, starting at 6:00 a.m. and ending at 4:30 p.m. ¹⁴ The second-shift warehouse employees work 4 10-hour days, Monday through Thursday, starting at 2:00 p.m. and ending at 12:30 a.m. The second-shift production employees also work 4 10-hour days Monday through Thursday, but start at 5:00 p.m. and end at 3:30 a.m.

The work hours of the Pratt Road facility drivers vary according to their assigned runs. They begin their work week on Sunday evenings, return to the facility once or twice during the week, depending on their runs, and end their work week midday on Friday. Some drivers have overnight runs. The DSD drivers located at the Barclay Road facility also start their work week on Sunday, return to the facility two to three times per week, and end their work week midday on Friday. All transportation drivers at Pratt Road and Barclay Road are subject to U.S. Department of Transportation regulations limiting their hours of work. The one warehouse employee who works at Barclay Road has similar hours to the Pratt Road warehouse employees on the first shift.

¹³ At the Pratt Road facility, seven warehouse employees work the first shift and two work the second shift.

¹⁴ At the Pratt Road facility, approximately 20 production employees work on the first shift and 15 on the second shift.

The four production employees at the Wolcott facility work the first shift. During the busy season, which occurs in November and December, the Employer adds a second shift at the Wolcott facility. The record does not reveal their hours of work.

All employees, except transportation employees who are subject to DOT regulations, receive a half-hour unpaid lunch break and two paid fifteen minute breaks. All employees, except transportation employees, punch a time clock. The warehouse employees at the Pratt Road facility use a different time clock than the production employees. The time clock used by the warehouse employees is located in the warehouse office where the plant clerical employee is located. The time clock used by the production employees is located in the production room. Transportation employees do not punch a time clock. They record their time on electronic log books.

Warehouse employees are paid between \$10 and \$15 per hour. Production employees are paid between \$9.25 and \$16.00 per hour. Transportation drivers are paid by the mile, ranging from 40 to 65 cents per mile. All employees are subject to an annual merit review which determines the amount, if any, of their increase.

All employees, once hired, complete orientation at the Pratt Road facility, and serve a 90-day probationary period. All employees are subject to the company policies outlined in the Employee Guidebook and are offered the same benefits, including health and disability insurance, vacation, holiday pay, sick time and bereavement time.

The Employer's warehouse and production employees wear different uniforms. The record indicates that safety glasses, hearing protection, shoe coverings, and lab coats are required in the production room at the Pratt Road facility. Production employees are not allowed to take their lab coats home and they do not receive a uniform allowance. Warehouse employees have a choice of several uniforms to purchase and they receive a uniform allowance. They are allowed to take their

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¹⁵ The record does not reveal whether production employees at Wolcott have the same requirements.

uniforms home. Transportation drivers receive the same uniform allowance and choice of uniforms as the warehouse employees. The transportation drivers are allowed to take their uniforms home. Warehouse employees at the Pratt Road facility use the same locker room as production employees.¹⁶ Transportation drivers do not use the locker room.

Interchange

A warehouse employee works in production at the Pratt Road facility two or three days per year. At the Pratt Road facility, when a warehouse employee is not available, a production employee, on occasion, will use a fork lift to get cheese down from the racks in the warehouse aging cooler. There are no occasions when production employees are temporarily transferred to perform warehouse duties. The record reveals one instance in which production employees washed the walls in the warehouse. There are no warehouse employees at the Wolcott facility, and no warehouse employee performs production duties at the Wolcott facility.

The record does not establish whether there is any interchange between the Pratt Road transportation employees and the Barclay Road DSD drivers, or that any production employee performs transportation duties. As stated above, there are two employees, one warehouse and one facilities maintenance/warehouse, who have Class B licenses and, on occasion, transport product between the Employer's facilities. They do not, however, drive the DSD trucks, unlike the transportation drivers who have a Class B license.

When a job opening occurs, the Employer first posts the opening internally. Only three permanent transfers among job classifications have occurred within the past five years. Two production employees transferred into the warehouse and one warehouse employee became a DSD driver.¹⁷

¹⁶ The record does not reveal whether there is a locker room at the Barclay Road or Wolcott facilities.

¹⁷ The record does not reveal whether the transfers were between facilities or within a single facility.

Contact

The front entrance to the Pratt Road facility is used predominately by production and administration employees. Warehouse employees can use that entrance but typically use the storage area entrance that leads directly into the warehouse. Production employees do not have access to the storage area entrance. Warehouse and transportation employees do not access the production room.

When the production room needs cheese, a production employee with the job title "640 cutter" gets it from a staging area in the warehouse. The Employer's plant manager testified that interaction between a 640 cutter and the warehouse aging cooler employee occurs 20 to 40 times per day. A warehouse employee, who was formerly a 640 cutter, testified that when he was a 640 cutter, he had very limited interaction with the warehouse employees. He testified that the 640 cutter's interaction was generally with one particular warehouse employee who works in the cooler removing product off the racks for the 640 cutter. He also testified that production employees wear ear protection, so they are unable to hear, thus limiting any conversation with the warehouse employee.

The Employer's plant manager also testified that a quality control employee²⁰ interacts 13 to 14 times per day with, usually, the same particular warehouse cooler employee referenced above, who moves the cheese into the staging area. Warehouse employees at the Pratt Road facility see the transportation employees for very short periods of time on days when they are picking up or dropping off a load. Although employees use the same break room, the record reveals that their breaks do not occur at the same time and that, at most, they pass one another as they enter or leave

¹⁸ There are only two or three production employees per shift qualified to run the 640 cutter.

¹⁹ The cheese is placed in the staging area by the warehouse employee assigned to work in the aging cooler.

²⁰ The record is unclear as to how many employees perform quality control work.

the break room. All employees who smoke at the Pratt Road facility use the same designated smoking area outside by the gazebo.

The warehouse employees at the Barclay Road facility interact with the DSD drivers two to four times per week when the DSD drivers come in to pick up their loaded trucks or are dropping off unsold product to be returned to storage.

The Employer holds separate monthly departmental meetings for warehouse, transportation, and production employees to discuss issues specific to their department. Periodically, the Employer holds meetings at its Pratt Road facility that employees from the three Helluva Good facilities are required to attend, including quarterly communication meetings, and occasional "Safe Food Quality," safety milestone, and United Way meetings. If transportation employees are unable to attend due to their work schedules, a separate meeting is held for them. The Employer also has a safety committee, that meets once per month at the Pratt Road facility and includes representatives from all departments.

Facilities Maintenance/Warehouse Employee

The Employer does not have a maintenance department. There is a facilities maintenance/warehouse position that has existed since April 3, 2000 at the Pratt Road facility. This job is held by Bob Reynolds, who primarily performs maintenance duties. The job description summary for the facilities maintenance/warehouse position states that the facilities maintenance/warehouse employee maintains buildings and grounds for local properties and assists in the warehouse as needed and requested. The job requirements also include the ability to lift and carry up to 60 pounds and to maintain a valid New York State Class C or higher driver's license, and a safe driving history. The position requires that the facilities maintenance/warehouse employee be able to operate material handling and seasonal equipment, such as a snow blower, lawn mower, shovel, chain saw and weed eater. Reynolds has a Class B license and has

periodically delivered product from the Pratt Road facility to the Barclay Road and Wolcott facility.²¹ He rarely performs warehouse-type functions, however, the maintenance shop is located in the middle of the warehouse and he has daily work-related contact with the warehouse employees.

Reynolds earns \$14.00 per hour. The record does not reveal his work schedule, but based on the maintenance and grounds work he performs, it appears that he works the day shift. He receives the same benefits as all other employees and is subject to the policies outlined in the Employee Guidebook. He is supervised by Adam DePuy, warehouse, facilities and transportation supervisor. Reynolds attends all warehouse meetings and he receives annual training on the forklift. When he is not at work, a warehouse employee usually performs his maintenance duties. The record also reveals that a warehouse employee works side-by-side with the facilities maintenance/warehouse employee mowing lawns and maintaining the grounds.

Clerical Employee

Clerical employee Donna Lehr works at the Pratt Road facility. She is responsible for receiving product, verifying the paperwork for picked orders, printing delivery tickets, and making appointments for the drivers with their customers. Her desk is located in the warehouse office, where she spends about 99 percent of her work day. The warehouse office is located approximately 10 feet from the warehouse. Lehr's supervisor is Adam DePuy. Lehr has daily work-related contact with the warehouse employees. Petitioner's witness testified that there is a lot of "traffic" in Lehr's office. Warehouse employees go into the warehouse office to check their mailboxes or to access the common computer used by all warehouse employees. Lehr uses a separate computer located next to the warehouse employees' computer. She is paid \$14.00 per hour. Lehr receives the

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²¹ The record does not reveal to what extent, if any, Reynolds interacts with the production employees at the Wolcott facility.

same benefits as all other employees and is subject to the policies outlined in the Employee Guidebook. She is the only clerical employee who is located apart from the administrative offices where the office clerical employees work. She works five eight-hour days, Monday through Friday, from 8:00 a.m. until 4:30 p.m. and uses the same time clock as the warehouse employees. She does not wear a uniform. Her job description does not require her to lift 40 pounds, as is required for the warehouse and production employees. Lehr attends the warehouse, but not production, departmental meetings. The record does not establish that she interacts with production employees regarding work issues. She takes her break in her office or the break room and uses the same parking lot as all employees. Her duties relate to the warehouse and transportation part of the Employer's operations, unlike the office clerical employees whose duties involve human resources, accounting, and finance. Lehr uses the same computer system as the warehouse and production employees. She communicates with the drivers if there are any changes that need to be made to their routes or their schedules, and the drivers give Lehr their paperwork for delivered products upon their return to the facility.

ANALYSIS

It is well established that the unit sought by the petitioner need not be the only or the most appropriate unit, but only that it be an appropriate unit. <u>Dezcon, Inc.</u>, 295 NLRB 109, 111 (1989); <u>Morand Bros. Beverage Co.</u>, 91 NLRB 409, 418 (1950), enfd. 190 F.2d 576 (7th Cir. 1951). The Board has stated that, when making unit determinations, it looks first "to the unit sought by petitioner. If it is appropriate, our inquiry ends. If, however, it is inappropriate, the Board will scrutinize the employer's proposals." <u>Dezcon, Inc.</u>, 295 NLRB at 111. Thus, the unit requested by the petitioner is a starting point for any unit determination. Furthermore, although Section 9(c)(5) of the Act provides that the extent of the union's organization shall not be the "controlling" factor, it is certainly a factor that the Board considers, in conjunction with other factors. <u>Central</u>

<u>Power & Light Co.</u>, 195 NLRB 743, 746 (1972); <u>Audiovox Communications Corp.</u>, 323 NLRB 647 (1997).

The Board generally attempts to select a unit that is the "smallest appropriate unit" encompassing the petitioned-for employee classifications. *Overnite Transportation Company*, 331 NLRB 662 (2000); *R & D Trucking*, 327 NLRB 531 (1999); *State Farm Mutual Automobile Insurance Co.*, 163 NLRB 677 (1967).

In order to insist on an alternative unit, the employer must first prove that the petitioned-for unit is an inappropriate unit based on a strong community of interest with other employees.

Audiovox Communication Corp., supra.** In making unit determinations based on community of interest, the Board examines such factors as: (1) functional integration; (2) frequency of contact with other employees; (3) interchange with other employees; (4) degree of skill and common functions; (5) commonality of wages, hours, and other working conditions; and (6) shared supervision. See **Publix Supermarkets**, *Inc.**, 343 NLRB 1023 (2004); **Ore-Ida Foods**, 313 NLRB 1016 (1994), affd. 66 F.3d 328 (7th Cir. 1995). Among the most important factors in determining that a group of employees enjoy a separate community of interest is that they perform their day-to-day work under separate supervision and the absence of interchange with other groups of employees. See **Executive Resources Associates**, 301 NLRB 400 (1991); **First Security Services** **Corp.**, 329 NLRB 235 (1999); **Monsanto Research Corp.**, 185 NLRB 137 (1970).

The Employer in the instant case argues that there is functional integration within its operations, frequent contact between warehouse, transportation and production employees, sufficient interchange, similarity in skills and functions, common terms and conditions of employment and some common supervision, sufficient to warrant the conclusion that a plant-wide bargaining unit is the only appropriate unit.

In the instant case, I conclude that the Employer has failed to prove that the community of interest between the warehouse, transportation and production employees is sufficient to find a unit of warehouse employees inappropriate.

The Board has found separate warehouse units appropriate for collective bargaining. In Esco Corp., 298 NLRB 837 (1990), the Board found a warehouse unit appropriate where warehouse employees performed separate functions from the sales and clerical employees, there was no interchange or substantial contact between them, and they had separate supervision. In Garrett Supply Company, 165 NLRB 561 (1967), the Board found a warehouse unit appropriate where the warehouse employees were separately located within the same building, punched a separate time clock, performed separate functions, did not leave the warehouse to perform tasks in other parts of the building, had separate supervision, and there was no bargaining history. In Vitro Corp., 309 NLRB 390 (1992), the Board found a warehouse unit appropriate, rather than a broader unit of warehouse and automatic data processing employees (ADP), based on the following community of interest factors: although the warehouse and ADP operations were functionally integrated, warehouse employees worked in a separate location under separate supervision, had different job duties and skills, different work requirements, such as the safety shoes and forklift license requirements for warehouse employees only, and permanent interchange and work-related contact between the two groups was minimal.

There is functional integration of the warehouse and production operations at the Employer's Pratt Road facility. The Barclay Road facility, however, only has production employees at the facility, unless it is performing the occasional special run, and there are no warehouse employees working at the Wolcott facility with the production workers.

While the warehouse and production employees possess similar skills, comparable wages, and receive the same benefits, there are significant differences in the remaining community of interest factors.

There is little work-related contact between a majority of the warehouse employees and the production employees. Warehouse and production employees, in general, leave or pick up product in staging areas in the cooler. There is little contact between the warehouse and production employee when this occurs.²² There are a few occasions when work-related conversation is required between warehouse and production employees. When this occurs, it is, for the most part, between a production employee qualified to operate the 640 cutter or a quality control employee²³ and, usually, the one particular warehouse employee assigned to get the product down from the rack and who also places the product in the staging area for pickup by the 640 cutter or quality control employee. Any other contact between warehouse and production employees occurs at the sporadic general meetings, quarterly communication meetings or is of a casual nature when passing one another going to or from the break room.

There is little interchange between the warehouse and production employees. The record revealed two instances in the past five years in which a production employee permanently transferred into the warehouse. Such a small number of permanent transfers do not indicate a substantial community of interest. See *The Aerospace Corporation*, 331 NLRB 561, 571 (2000); *Big Buck Lumber*, 241 NLRB 639, 641 (1979). In addition, it is well established that permanent transfers are afforded less weight than temporary interchange in assessing the community of interest shared by employees. *Franklin Mint Corp.*, 254 NLRB 714, 716 (1981). The record reveals little

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²² While the plant manager testified that there may be 20 to 40 instances of contact per day, an employee who actually performed the 640 cutter job in production, testified that he only had limited conversation with the warehouse employee when performing this function.

²³ It appears from the record that the quality control employees are not production employees, as the plant manager testified that one production employee was "moved out of production into quality." The record does not reveal any further evidence specific to the quality employees.

temporary interchange. A warehouse employee has been temporarily reassigned to production for two or three days per year; and, on occasion, a production employee uses the forklift to bring cheese down from the rack when a warehouse employee is on break. The Board places little weight on temporary interchange where, as here, it is relatively infrequent and irregular and where the work performed in the warehouse is only incidental to the performance of a primary function elsewhere. See *Garrett Supply Company*, 165 NLRB 561, 562 (1967).

In addition to the minimal interchange between the warehouse and production employees, the majority of the two groups of employees are separately supervised. Ten of the 12 warehouse employees, including the facilities maintenance/warehouse employee, the plant clerical employee, and the warehouse employees at the Barclay Road facility, 24 are supervised separately from the production employees on the first shift. Recently, the Employer hired a second-shift supervisor to supervise the 15 production and 2 warehouse employees on the second shift. He is being trained on the first shift by the production supervisor and by a former production employee who was moved into quality control. There is no indication in the record that he is being trained regarding supervision of warehouse functions. It appears that supervision of the two warehouse employees on the second shift is incidental to his main function on the second shift, i.e., supervision of the production room. The Board has found that where, as here, there is evidence of some "cross-supervision" of classifications, but also evidence of separate immediate supervision, the evidence regarding supervision is insufficient to support the employer's contention that a wall-to-wall unit is the smallest appropriate unit. *Overnite Transportation Company*, 331 NLRB 662, 663 (2000).

There are other significant differences between the warehouse and production employees.

The number of days worked and the shift times of the first-shift warehouse employees differ from

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²⁴ As noted above, there is one full-time warehouse employee at Barclay Road and one warehouse employee who works two days at the Pratt and three days at Barclay.

those of the production employees. While the number of days worked by the second shift warehouse employees is the same as the second shift production employees, the hours of their work shifts differ. Both groups punch a time clock but they are located in separate areas. They use the same break room but not necessarily at the same time. The warehouse employees uniforms are different from those worn by the production employees and the warehouse employees receive a uniform allowance. Warehouse employees generally use the "storage area" entrance door to the Pratt Road facility, to which production employees do not have access. Production employees use the front entrance. All warehouse employees are trained to operate a forklift and are required to have forklift certification, while only some production employees are so trained and they are not required to be certified.

Based on the above, I conclude that the production employees do not share such a strong community of interest with the warehouse employees as to require their inclusion in a bargaining unit with the warehouse employees.

Warehouse employees share even less of a community of interest with the transportation employees. Warehouse employees have contact with the transportation employees for only a few minutes, a few times per week, and production employees have virtually no contact with them. Transportation drivers are required to possess commercial drivers' licenses, unlike the warehouse and production employees. They spend the majority of their time away from the plant, are not paid an hourly wage, do not punch a time clock, do not use the locker room, have separate departmental meetings and are subject to DOT regulations governing their break times and hours of work. The record reveals only one instance of a warehouse employee transferring to a transportation position. The record does not reveal whether the transfer was voluntary or was required by the Employer. ²⁵

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²⁵ See <u>Red Lobster</u>, 300 NLRB 908, 911 (1990) and <u>Lipman's</u>. 227 NLRB 1436, 1438 (1996), in which the Board gave less weight to voluntary, permanent interchange in unit determinations.

While the transportation and warehouse employees at the Pratt Road facility are supervised by the same supervisor, the DSD drivers at the Barclay Road facility are supervised by a separate supervisor.

In <u>Overnite Transportation Company</u>, supra, the Board excluded drivers from a warehouse unit of unskilled employees at the employer's service center where the drivers spent most of their time away from the employer's facility, only a small majority of the dockworkers were qualified to drive and those that did, spent a *de minimus* amount of their workday driving, all transfers of dockworkers to driver positions were voluntary, and there was separate supervision in the plantwide unit proposed by the Employer. The facts of the instant case are similar. Accordingly, I conclude that there is an insufficient community of interest between the transportation drivers and the warehouse employees to warrant the inclusion of the transportation employees in the unit found appropriate herein.

In its post-hearing brief, the Employer cites <u>BASF Systems Division of BASF Wyandotte</u>

<u>Corporation</u>, 222 NLRB 712 (1976), which it asserts is factually similar to the instant case. In

<u>BASF</u>, the Board found an overall production and maintenance unit to be appropriate, rather than
the petitioned-for unit of warehousemen, drivers and shipping and receiving employees at the
employer's distribution center. <u>BASF</u>, however, is distinguishable from the instant case, as there
was significantly more contact between a *majority* of its production and warehouse employees, and
a greater degree of integration of the shipping and receiving functions with other functions
performed in the production area. One of the production employees worked in the distribution
center with the shipping and receiving employees, distribution employees delivered product into the
production area several times per day, production employees worked overtime in the distribution
area, and transfers and promotions were made into and out of the distribution center.

One of the determining factors in the Board's conclusion in <u>BASF</u> that the distribution center employees did not possess the degree of functional distinctness and autonomy which would warrant a finding that they have a separate community of interest, was the "frequent contact between the majority of the distribution center employees and the production employees." Id. at 713.

Specifically, 65 percent of the distribution center employees were classified as warehousemen who notified the production department when product was received, delivered it into the production area, and picked it up from a staging area in the production area for return to the distribution center. All of the distribution center employees performed these duties at various times. In the instant case, there is far less interaction between the warehouse employees and the production employees than between the employees at issue in <u>BASF</u>. Thus, there was significantly more integration, interaction and interchange present in <u>BASF</u> than in the instant case.

The Employer also relies on <u>Publix Super Markets, Inc.</u>, 343 NLRB 1023 (2004), in support of a plant-wide unit. While the Board in <u>Publix</u>, found a plant-wide unit appropriate, there was, unlike the instant case, a significant amount of work-related contact among employees, a significant number of plant-wide permanent transfers and temporary interchange between the distribution and production employees, including temporary reassignments.

The Employer argues that the Regional Director, in *HP Hood, LLC*, Case 3-RC-10667, (Decision and Direction of Election dated April 9, 1998), found a plant-wide unit appropriate. In that case, the petitioner was seeking to represent a warehouse unit at the Employer's Oneida, New York facility. The Regional Director concluded that a unit of all production, maintenance and warehouse employees was an appropriate unit. In that case, however, unlike here, there was daily contact, including "constant calls," between the production and warehouse employees, and warehouse employees delivered product into the production area; employees were temporarily reassigned to work in another department to catch up on a backlog of work; production and

warehouse employees performed the warehouse function of picking up empty pallets in the warehouse and returning them for use in their respective areas; the production supervisor issued discipline to warehouse employees; employees punched the same time clock; and safety training was conducted by shift, rather than by department.

In its post-hearing brief, the Employer also cites, inter alia, <u>Abdow Corp.</u>, 271 NLRB 1269 (1984), for circumstances in which the Board will find a plant-wide unit appropriate. That case is distinguishable from the facts herein, as the Board found that there was substantial interaction and interchange between the groups of employees at issue, dock workers and kitchen and bakery employees. Specifically, there was a small complement of employees in a single building, the building was designed so that the dockworkers and kitchen employees had to travel through each others' work area several times per day, the employees worked the same days of the week, and all employees performed dockworkers' duties.

Based on the foregoing and the record as a whole, I conclude that the warehouse employees share a community of interest sufficiently separate and distinct from the transportation and production employees of the Employer to "warrant their establishment in a separate unit." See Central Power & Light, 195 NLRB 743, 745 (1972).

The parties disagree as to whether the facilities maintenance/warehouse employee and clerical employee Donna Lehr have a sufficient community of interest with the warehouse employees to warrant their inclusion in the unit found appropriate. Petitioner argues that the clerical employee is an office clerical, who along with the facilities maintenance/warehouse employee, has an insufficient community of interest with the warehouse employees. The Employer argues that they should be included with the warehouse employees in the unit determined to be appropriate.

The facilities maintenance/warehouse employee often works with other warehouse employees performing maintenance functions. There is at least one warehouse employee performing maintenance work on a regular basis one day each week. The record does not reveal that he has any specialized skills. The facilities maintenance/warehouse employee's hours of work and all other terms and conditions of employment are the same as the warehouse employees. His rate of pay falls within the range of pay for warehouse employees. He is supervised by the warehouse, facilities and transportation supervisor and attends the warehouse departmental meetings. When he is out of the plant, a warehouse employee performs his duties.

I conclude that the facilities maintenance/warehouse employee shares a strong community of interest with the warehouse employees. They have daily work-related contact and the warehouse employees perform maintenance duties, including when the facilities maintenance/warehouse employee is absent. They have common supervision, wages, hours, and other terms and conditions of employment. Accordingly, I will include the facilities maintenance/warehouse employee in the unit found appropriate herein.

I find, in agreement with the Employer, that Donna Lehr is a plant clerical employee. The distinction between plant clericals and office clericals is rooted in community-of-interest concepts. Cook Composites & Polymers Company, 313 NLRB 1105, 1108 (1994). Although certain factors predominate in Board decisions finding employees to be plant, rather than office clericals, the "indispensable and conclusive element is that the asserted plant clericals 'perform functions closely allied to the production process or to the daily operations of the production facilities at which they work.'" Gordonsville Industries, Inc., 252 NLRB 563, 591 (1980), quoting Fisher Controls Co., 192 NLRB 514 (1971).

²⁶ The Petitioner has not cited any authority in support of its argument to exclude this position, other than cases which set forth the community of interest factors referenced herein.

Contrary to the Petitioner's assertions, the record contains no evidence that warrants a finding that Lehr is an office clerical employee. The Petitioner has not cited any authority that would support its position in this regard. Rather, the record is replete with evidence that Lehr is a plant clerical whose job duties are closely tied to the warehouse function. The evidence shows that Lehr's job duties are functionally integrated with that of the warehouse employees. Further, the record shows that Lehr has regular and substantial interaction with the warehouse employees throughout the course of the day. The warehouse employees enter her office to use the computer and access their mailboxes on a daily basis. Lehr's office is located 10 feet from the warehouse and is not in the administrative office area of the facility. She has common supervision with the warehouse employees, works the same days of the week and similar hours as the first-shift warehouse employees, punches the warehouse time clock, and has the same terms and conditions of employment as the warehouse employees. Her rate of pay falls within the range of pay for warehouse employees. She attends the warehouse departmental meetings. Her duties are more closely in line with that of a plant clerical than an office clerical. See All-American Distributing Co., Inc., 221 NLRB 980 (1975). Based on these factors, I conclude that she shares a strong community of interest with the warehouse employees and I will include the plant clerical employee in the unit found appropriate herein.

There is one warehouse leadman at the Pratt Road facility and one warehouse leadman at the Barclay Road facility. I conclude that, inasmuch as the parties are in agreement that any unit found appropriate should include these employees as they share a community of interest with the other warehouse employees, I will include the warehouse leadmen at the Pratt Road and Barclay Road facilities in the unit.

CONCLUSION

Accordingly, I find that the following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time warehouse employees, including warehouse leadmen, the facilities maintenance/warehouse employee and the plant clerical employee, located at the Employer's Heluva Good facilities; excluding all other employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

There are approximately 12 employees in the bargaining unit found appropriate herein.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by **International Brotherhood of Teamsters, Local 118.** The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. <u>Excelsior Underwear</u>, <u>Inc.</u>, 156 NLRB 1236 (1966); <u>NLRB v. Wyman-Gordon Company</u>, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. North Macon Health Care Facility, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). This list may initially be used by me to assist in determining an adequate showing of interest. I shall, in turn, make the list available to all parties to the election.

To be timely filed, the list must be received in the Regional Office on or before **July 7**, **2010.** No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted to the Regional Office by electronic filing through the Agency's

website <u>www.nlrb.gov</u>,²⁷ by mail, by hand or courier delivery, or by facsimile transmission at (716) 551-4972. The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending party.

Since the list will be made available to all parties to the election, please furnish a total of **three** copies of the list, unless the list is submitted by facsimile or e-mail, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for at least 3 working days prior to 12:01 a.m. of the day of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on non-posting of the election notice.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington, DC by 5 p.m. EDT on **July 14, 2010**. The request may be

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²⁷ To file the eligibility list electronically, go to www.nlrb.gov and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu. When the E-File page opens, go to the heading **Regional**, **Subregional and Resident Offices** and click on the "File Documents" button under that heading. A page then appears describing the E-Filing terms. At the bottom of this page, check the box next to the statement indicating that the user has read and accepts the E-Filing terms and click the "Accept" button. Then complete the filing form with information such as the case name and number, attach the document containing the eligibility list, and click the Submit Form button. Guidance for E-filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Board's web site, www.nlrb.gov.

filed electronically through the Agency's web site, <u>www.nlrb.gov</u>, 28 but may <u>not</u> be filed by facsimile.

DATED at Buffalo, New York this 30th day of June, 2010.

RHONDA P. LEY, Regional Director National Labor Relations Board, Region 3 Niagara Center Building – Suite 630 130 S. Elmwood Avenue Buffalo, New York 14202

²⁸ To file the request for review electronically, go to www.nlrb.gov and select the E-Gov tab. Then click on the E-Filing link on the menu. When the E-File page opens, go to the heading Board/Office of the Executive Secretary and click on the "File Documents" button under that heading. A page then appears describing the E-Filing terms. At the bottom of this page, check the box next to the statement indicating that the user has read and accepts the E-Filing terms and click the "Accept" button. Then complete the filing form with information such as the case name and number, attach the document containing the request for review, and click the Submit Form button. Guidance for E-filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Board's web site, www.nlrb.gov.